

MAR 31 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEDRO MEJIA-AMAYA; MARTHA
CONSUELO MARTINEZ DE MEJIA,

Petitioners,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 07-70136

Agency Nos. A029-131-898
A029-213-010

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted March 18, 2009**

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Pedro Mejia-Amaya and Martha Consuelo Martinez de Mejia, natives and citizens of Mexico, petition for review of the Board of Immigration Appeals' ("BIA") order denying their motion to reopen. Our jurisdiction is governed by

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

8 U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen, *Iturribarria v. INS*, 321 F.3d 889, 894 (9th Cir. 2003), and we deny in part and dismiss in part the petition for review.

The BIA acted within its discretion in denying petitioners' motion as untimely because it was filed more than five years after the BIA's prior order, *see* 8 C.F.R. § 1003.2(c)(2), and petitioners failed to establish grounds for equitable tolling, *see Iturribarria*, 321 F.3d at 897 (equitable tolling is available "when a petitioner is prevented from filing because of deception, fraud, or error," as long as the petitioner acted with due diligence).

The record does not support petitioners' contention that the BIA made an adverse credibility determination. *Cf. Bhasin v. Gonzales*, 423 F.3d 977, 986-87 (9th Cir. 2005).

We lack jurisdiction to review the BIA's refusal to reopen proceedings *sua sponte*. *See Ekimian v. INS*, 303 F.3d 1153, 1159-60 (9th Cir. 2002).

PETITION FOR REVIEW DENIED in part; DISMISSED in part.